

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

GARY L. MARCUM,

Petitioner,

v.

CIVIL ACTION NO. 2:10-CV-107
(BAILEY)

J. ESPARZA, Associate Warden,
JOEL ZIEGLER, Warden,

Respondents.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day, the above-styled matter came before the Court for consideration of the Report and Recommendation of United States Magistrate Judge James E. Seibert. Pursuant to local rule, this action was referred to Magistrate Judge Seibert for submission of a proposed report and a recommendation ("R & R"). Magistrate Judge Seibert filed his R & R on September 14, 2010 [Doc. 8]. In that filing, the magistrate judge recommended that this Court dismiss the § 2241 petition without prejudice so that the petitioner may properly refile it as a ***Bivens*** action.

Pursuant to 28 U.S.C. § 636 (b) (1) (c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Arn***, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo*

review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); **Snyder v. Ridenour**, 889 F.2d 1363, 1366 (4th Cir. 1989); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984). Here, objections to Magistrate Judge Seibert's R & R were due within fourteen (14) days of filing of this same, pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b). The docket reflects that service was accepted September 16, 2010. See Doc. 9. No objections to the R & R have been filed. Accordingly, this Court will review the report and recommendation for clear error.

This Court notes that, although the petitioner did not file any objections to the R&R, on October 22, 2010, the petitioner did file a motion for counsel so that he may pursue a **Bivens** action. As such, this Court finds that the petitioner not only did not object to the R&R, but it appears that he concurs with the recommendations therein.


Accordingly, upon careful review, it is the opinion of this Court that the magistrate judge's **Report and Recommendation [Doc. 8]** should be, and is, hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. As such, the petitioner's § 2241 petition **[Doc. 1]** is hereby **DISMISSED WITHOUT PREJUDICE** with **LEAVE** to file a **Bivens** action. Accordingly, this matter is **ORDERED STRICKEN** from the active docket of this Court.

As a final matter, the petitioner's motion to appoint counsel **[Doc. 10]** simply states that he no longer has help in pursuing this matter and that he is ignorant. This Court finds that these reasons in support fail to state sufficient grounds upon which this Court may find good cause to grant representation at this time. Accordingly, the motion to appoint counsel **[Doc. 10]** is hereby **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: November 30, 2010.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE